IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 498

PARMELEE TRANSPORTATION COMPANY,
A DELAWARE CORPORATION,

Plaintiff,

vs.

JOHN L. KEESHIN, ET AL.,

Defendants.

IN THE MATTER OF CRIMINAL CONTEMPT OF
THOMAS C. McCONNELL,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Thomas C. McConnell, respectfully prays that a writ of certiorari may issue to the United States Court of Appeals for the Seventh Circuit to review a judgment of that Court affirming in part Specification 6 of a contempt order entered under Rule 42(a) of the Federal Rules of Criminal Procedure against this petitioner on June 30, 1960, by Judge Julius H. Miner of the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Seventh Circuit, rendered on July 6, 1961, are not yet reported but are printed in the appendix hereto, *infra*, pp. 1-14.

The opinion of the United States Court of Appeals for the Seventh Circuit, rendered on July 10, 1961, reversing the contempt conviction of petitioner's co-counsel, Lee A. Freeman, in related Appeal No. 13176, is not yet reported but is printed in the appendix hereto, *infra*, pp. 15-22.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 6, 1961, and is printed in the appendix hereto, *infra*, p. 23. Petitioner thereupon filed a petition for rehearing which was denied on October 5, 1961. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U. S. C. § 1254(1) and Rule 22(2) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED FOR REVIEW

1. Can a lawyer be summarily sentenced for criminal contempt where no obstruction to the performance of judicial duty is shown, as required by subsection (1) of 18 U. S. C. § 401, limiting the power of a judge to punish for criminal contempt to "Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice"?

2. Can a lawyer be sentenced for criminal contempt under Section 42(a) of the Federal Rules of Criminal Procedure where it was conceded by the trial judge that no emergency of any kind was presented?

STATUTE AND RULES INVOLVED

1. 18 U. S. C. § 401, 62 Stat. 701, providing in pertinent part:

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; * * *."

2. Rule 42 of the Rules of Criminal Procedure for United States District Courts, Rule 42, 18 U. S. C., providing:

"(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding

of guilt the court shall enter an order fixing the punishment."

3. Rule 43(c) of the Rules of Civil Procedure for the United States District Courts, Rule 43(c), 28 U. S. C., providing in pertinent part:

"(c) Record of Excluded Evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon * * *."

STATEMENT OF THE CASE.

The decision of the Court of Appeals was rendered after an appeal by petitioner from an order entered by Judge Julius H. Miner on June 30, 1960, adjudging petitioner guilty of criminal contempt and sentencing him to confinement for a period of ten days on each of three specifications described in the contempt order, said sentences to run concurrently. The contempt order (R. 6-11) was entered by Judge Miner under Rule 42(a) of the Federal Rules of Criminal Procedure and the alleged acts of contempt occurred during the trial of the case of *Parmelee Transportation Company* v. *John L. Keeshin, et al.*, in which case a petition for certiorari is presently pending in this Court (Docket No. 431).*

* The record in the *Parmelee* case is part of the record in this cause and consists of the six-volume printed appendix filed in the court below. The remainder of the printed record in this cause is contained in a separate printed appendix filed below on petitioner's appeal and related appeal No. 13176. References herein to the *Parmelee* record will contain both the appropriate volume and page number, while references to the separate appendix record will contain the page number only.

Of the three specifications of contempt entered by the trial court against this petitioner, two of them, designated as Specifications 5 and 7, were held not to constitute any contempt as a matter of law by unanimous decision of the Court of Appeals (App., *infra*, pp. 3, 7). Four specifications of contempt entered by Judge Miner aganst Lee A. Freeman, petitioner's co-counsel, were likewise dismissed as not constituting contempt as a matter of law (App., *infra*, p. 22). The third specification entered against this petitioner was affirmed in part by the vote of two of the Court of Appeals judges, with Judge Duffy, Circuit Judge, dissenting. He said (App., *infra*, pp. 13-14):

> "I agree with the majority opinion that the convictions under Specifications 5 and 7 should be reversed. * * *
>
> "I would also reverse as to Specification 6. * * *
>
> * * * * *
>
> "* * * There was no obstruction in the administration of justice. In my view, the conviction for criminal contempt under Specification 6 should also be reversed."

The majority opinion affirmed the holding of contempt on Specification 6, although reducing the punishment from a jail sentence to a fine of $100.00. As to that, the majority opinion says (App., *infra*, p. 7):

> "As to specification 6, we hold that with the exception of one statement attributed to respondent, nothing with which he is charged has been supported by proof of contumaciousness or disrespect.
>
> "The exception in specification 6, to which we have just referred, charges that respondent said:
>
> "'* * * We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us.'"

The circumstances under which petitioner made these remarks are summarized in Judge Duffy's dissenting opinion as follows (App. *infra*, p. 13):

> "* * * The majority opinion describes the difficulties the plaintiff's counsel McConnell encountered in trying to preserve his client's rights. The attorneys for plaintiff were driven to a sense of frustration due to the District Court's rulings on offers of proof. Under such circumstances, it is understandable that an attorney might say things which should not have been said. I think that was the situation in the case at bar.
>
> "However, the majority opinion does not adequately present the setting in which the McConnell statement was made. He addressed the Court as follows: 'We have a right to ask questions which we offer on this issue, and Your Honor can sustain their objection to them. We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us.' McConnell's statement occurred during the reading of the deposition of Howard E. Simpson, president of the Baltimore & Ohio Railroad. Simpson was a defendant. One of plaintiff's attorneys was reading portions of Simpson's adverse examination to lay the foundation for an offer of proof. The statement made by McConnell was followed almost immediately by a recess. When the court session was resumed, Mr. McConnell complied with the Court's ruling, and did not persist in asking the particular questions.
>
> "It might be noted that counsel's vigorous insistence on preserving his client's rights bore fruit, as the trial judge later changed his ruling. Counsel was then permitted to ask questions in the presence of the jury as a condition precedent to the offers of proof made in accordance with Rule 43(c), Federal Rules of Civil Procedure."

Prior to this incident, the trial court had improperly limited the issues in an antitrust suit to be tried before a jury to the issue of "public injury" (R. I, 396-416, 441-2),

which issue this Court subsequently declared to be irrelevant in the trial of an antitrust case for damages. *See Radiant Burners, Inc. v. Peoples Gas Light and Coke Company, et al.*, 364 U. S. 656, 660 (1961).

Under this ruling, petitioner was precluded from offering any evidence of the conspiracy alleged in the complaint, and it was in an effort to offer proof of conspiracy in order to preserve a record for review on the issue of "public injury" that petitioner's difficulties arose.

As stated in the majority opinion (App. *infra*, pp. 4-5):

> "He [McConnell] attempted to follow the usual procedure, which consists of putting a question to a witness in the presence of the jury and, when an objection is made, an offer of proof is made out of the presence of the jury. Finally the court admitted that this procedure followed by respondent was required by 'the cases' as he 'read them'. However, later the court struck from the record several offers of proof bearing upon the charges of conspiracy and monopoly, for the reason that these charges had nothing to do with the question of public injury.
>
> "* * * The method that respondent followed is in accord with the long-established practice in Anglo-Saxon courts and this incident emphasizes the great importance of trial court experience for lawyers generally. Ironically, respondent's adherence to what he had learned in this respect in the courts led to his being ordered to jail."

It is thus conceded by both opinions of the Court of Appeals that, in the face of the trial court's threat to abrogate the rule, petitioner's remarks constituted nothing more than a threat to meet the conditions imposed by Rule 43(c) of the Federal Rules of Civil Procedure. Parenthetically, this rule was promulgated by this Court and specifies and describes the method which petitioner was attempting to use *as the sole method of preserving an offer of proof for review by a court of appeals.*

Petitioner's remarks not only were occasioned by the trial judge's ruling but by opposing counsel's insistence that the rule be followed (R. II, 598).

The ruling of the Court of Appeals which this petition seeks to review by certiorari threatens the destruction of a litigant's right to make a proper offer of proof. It is apparent that under the ruling of the Court of Appeals there is no way a lawyer can make such an offer in the event, as here, the trial court decides to abrogate the Rules of Civil Procedure, unless he is willing to subject himself to the risk of a contempt sentence. The public interest involved in changing such a ruling is apparent.

REASONS FOR GRANTING THE WRIT.

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH THE DECISIONS OF THIS COURT AND HAS SO FAR DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEDURE AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF REVIEW.

The court below states (App., *infra*, p. 7):

> "The whole theory for holding respondent immune from his conduct in representing his client in good faith is satisfied when he is permitted to make a record in a respectful manner in the trial court for use in a court of review."

The court below thus tacitly admits that in so far as it was necessary for petitioner to act to make a record for review, he could not be guilty of contempt.

In the instant case, this Court created the method for making a record on appeal by offer of proof by the writing of Rule 43(c) of the Federal Rules of Civil Procedure. In the instant case, counsel opposing petitioner's client were properly insisting upon its application. Their chief counsel said (R. II, 598):

> "* * * We are not going to sit still for a moment and have an offer of proof made that is not directed to a question pending before a witness who is on the stand because that is exactly what the rule says * * *."

When Judge Miner undertook to set aside the rule asserted by defense counsel, petitioner, then faced with opposing counsel's objections, was left with no method of making a record for review except his right to insist upon

asking questions pursuant to the rule until stopped by the threat of contempt. We most respectfully suggest that asking questions pursuant to the rule does not constitute "misbehavior" within the meaning of Subsection 1 of 18 U. S. C. § 401. We further submit that petitioner's consequent threat to ask questions in accord with the rule, should not make him a criminal because it was not an obstruction to judicial duty. The proper rule to be invoked is as stated by this Court in *Ex Parte Hudgings*, 249 U. S. 378 (1919), at page 383:

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted, * * *."

In the instant case, petitioner's position, instead of obstructing "judicial duty", brought about a compliance with Federal Rule 43(c). As a result of the colloquy and after the incident had taken place, the trial court said (R. III, 935):

> "* * * the cases as I read them require the presenting of a witness to ask him some questions, and when I decline to let him answer, then they can proceed with the offer of proof.
>
> "By Mr. Thompson: There isn't any question about that. All of us agree with that."

In the instant case, Circuit Judge Duffy held specifically that the incident set forth under Specification 6 did not tend to obstruct the administration of justice. He said (App., *infra*, p. 14):

> "Nevertheless, Mr. McConnell did comply with the Court's order. At that point there was no interference with the conduct of the trial. There was no obstruction in the administration of justice. In my view, the con-

> viction for criminal contempt under Specification 6 should also be reversed."

The instant record shows that petitioner was being whipsawed between opposing counsel's proper objections and the court's erroneous ruling. In this situation, *all that petitioner threatened to do was to ask questions in the exact manner prescribed by Rule 43(c) of the Federal Rules.*

Ironically, in referring to the charges under the preceding Specification 5, the majority opinion stated that the record must show an obstruction to justice if a conviction for contempt is to be sustained. It said (App., *infra*, p. 6):

> "In the case at bar the order from which the appeal was taken contains no finding that respondent's conduct tended to obstruct or continued to obstruct the administration of justice * * *."

However, in dealing with Specification 6, the Court ignored this limitation on the summary use of power by a trial court imposed not only by the decisions of this Court but by the statute as well (See 18 U. S. C. § 401).

II.

IN AFFIRMING JUDGE MINER'S REFUSAL TO DISQUALIFY HIMSELF, THE COURT OF APPEALS' DECISION REFUSES TO FOLLOW APPLICABLE DECISIONS OF THIS COURT.

The decision of the Court of Appeals in affirming summary punishment is in direct conflict with the holdings of this Court in *Offutt* v. *United States*, 348 U. S. 11 (1954) and *Cooke* v. *United States*, 267 U. S. 517 (1925).

In the instant case, petitioner was not sentenced under Specification 6 until six weeks after the conclusion of the trial (R. IV, 1718) and after the trial court had stated he was holding petitioner in contempt for making "direct at-

tacks on the Court" (R. IV, 1718). At the same time, he stated: "There is no emergency about it" (R. IV, 1718).

In the *Offutt* case, Mr. Justice Frankfurter, rendering the majority opinion, quoted with approval the language of *Cooke* v. *United States*, and based a decision of reversal thereon. The quoted language utilized was:

> "* * * where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place." (348 U. S. at pp. 14-5.)

In the *Offutt* case, this Court reversed the holding of contempt entered by a judge who had refused to ask one of his fellow judges to take his place.

In the instant case, Judge Miner proceeded to deal summarily with the matter even though he admitted no emergency was present, and even though no obstruction of justice was shown. On a motion to vacate he was specifically asked to disqualify himself. This he refused to do by denying the motion (R. 11-19, 42).

CONCLUSION.

The ruling of the Court of Appeals for the Seventh Circuit in the case at bar is manifestly erroneous and against public policy, and raises a serious question in the administration of justice in the United States courts. The question presented is of paramount public importance because, as shown by the instant record, unless a lawyer is permitted to comply with the rules of the court, a litigant can never assert rights in the courts. He not only cannot receive a fair trial, but he has no recourse on review in the upper courts. Under the ruling in this case, it is impossible for a lawyer to make an offer of proof in accord with a

rule promulgated by this Court without running the risk of a jail sentence.

It is therefore respectfully urged that irrespective of the rights of this particular petitioner, and on the ground of the manifest public interest in the questions presented, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS C. MCCONNELL.

Pro Se.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

No. 13175 SEPTEMBER TERM, 1960 APRIL SESSION, 1961.

PARMELEE TRANSPORTATION COMPANY, a Delaware corporation, *Plaintiff*,
v.
JOHN L. KEESHIN, ET AL., *Defendants*.

In the matter of criminal contempt of THOMAS C. McCONNELL, *Respondent-Appellant*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 6, 1961.

Before DUFFY, SCHNACKENBERG and CASTLE, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Thomas C. McConnell, respondent, has appealed from an order of the district court entered by Judge Julius H. Miner thereof, on June 30, 1960, adjudging him guilty of criminal contempt and sentencing him to confinement for a period of ten days on each of three specifications described in said contempt order, said sentences to run concurrently. The alleged acts of contempt occurred in connection with the trial of the case of *Parmelee* v. *Keeshin, et al.*[1]

1. An appeal in this case was decided in this court, as case No. 13160, on June 30, 1961.

1. Specification 5 reads as follows:

> "On April 21, 1960, prior to the selection of a jury, although Thomas C. McConnell, by his own statement, had read the transcript of the previous hearing in the cause at which the Court of its own motion suggested that consideration be given to separation of the issue of public injury for trial, and although no such suggestion or motion had been made by any attorney for any defendant at any hearing in the case, Mr. McConnell stated as follows:
>
> > "'This should be a forum where we could have that lawsuit tried without being hemmed in and penned in with a lot of artificial restrictions, dreamed up by counsel on the other side, whereby we are not given an opportunity to tell this jury what this lawsuit is about.'"

Respondent contends that he did not take the position that the court had no right to divide issues "under Rule 21," but that the issue the court proposed to segregate for trial was irrelevant. This position of respondent is supported by *Radiant Burners* v. *Peoples Gas Co.*, 364 U.S. 656, 660. In fact, Judge Miner, at the end of the case, seems to have conceded that McConnell was not arguing the power of the court to separate legitimate issues for trial, when the judge said:

> "* * * Plaintiff opposed the separation on legal grounds, arguing that it was unnecessary for plaintiff to prove public injury as such; * * *"

Nevertheless the court then said that he had read the briefs and the pleadings and that plaintiff made a specific allegation of public injury, which the defendants denied, and hence it was prerequisite that it be established.

We find it most difficult, if not impossible, to read into anything referred to in specification 5 any contumacious conduct by respondent. While no defense attorney had made a suggestion or motion for separation of the issue

of public injury for trial, the court had indicated that from reading the briefs and pleadings, the defendants had made a special denial of public injury and "that makes a prerequisite its establishment before we can go on with the others, the right to recover." In view of the correct contention of respondent that public injury was not a relevant issue, it is evident from the charge in specification 5 that respondent was referring to the arguments in the briefs and pleadings of defendants and that he had substantial basis for the language which he used, in view of the Supreme Court holding in *Radiant Burners, supra,* as well as *Radovich v. National Football League*, 352 U.S. 445, 453.

We hold that, on the record before this court, specification 5 does not validly charge respondent with contempt of court.

Specification 6 reads as follows:

> "On April 27, 1960, in the presence and hearing of the jury, after the Court had instructed the attorneys for plaintiff to refrain from repeatedly asking questions on subjects which the Court had ruled was not admissible, in the presence of the jury as distinguished from an offer of proof outside the presence of the jury, the following occurred:
>
> > 'By Mr. McConnell: Now you are trying to tell us we can't ask these questions. We have a right to ask these questions, and until we are stopped from asking these questions we are going to ask them, because it is in our prerogative in doing it.
> >
> > 'By the Court: I am now stopping you from asking the questions about conversations with Mr. Cross, because I have ruled specifically, definitely and completely that it is not an issue in this case.
> >
> > 'By Mr. McConnell: We have a right to ask them.
> >
> > 'By the Court: You can offer proof on it.
> >
> > 'By Mr. McConnell: We have a right to ask

> questions which we offer on this issue, and Your Honor can sustain their objection to them. We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us.' "

As indicated in our opinion in No. 13160, the case of *Parmelee* v. *Keeshin, et al.*, was on trial before court and jury when respondent proposed to make offers of proof outside the presence of the jury. Upon defendants' rejection of plaintiff's suggestion, the court ordered the trial to proceed. Respondent stated that the offers would involve proof of the conspiracy and monopoly issues, which he was advised "will have to be made outside the presence of the jury". The court responded: "That is correct. That is my ruling."

Respondent explained that he was simply laying a basis in the record for an appeal and that he wished to have the record show the offers that he was making.

He attempted to follow the usual procedure, which consists of putting a question to a witness in the presence of the jury and, when an objection is made, an offer of proof is made out of the presence of the jury.[2] Finally the court admitted that this procedure followed by respondent was required by "the cases" as he "read them". However, later the court struck from the record several offers of proof bearing upon the charges of conspiracy and monopoly, for the reason that these charges had nothing to do with the question of public injury.

It is obvious that respondent, although with difficulty, was maintaining his client's position, despite the shift in the court's rulings as to the submission of offers of proof in a jury case. The method that respondent followed is in accord with the long-established practice in Anglo-Saxon courts and this incident emphasizes the great im-

2. This procedure is recognized by 28 U.S.C.A. Rule 43(c).

portance of trial court experience for lawyers generally. Ironically, respondent's adherence to what he had learned in this respect in the courts led to his being ordered to jail. Fundamentally there is no adequate substitute in the heat of a contested trial for prior trial experience. Of course in these days, when more money can be made by lawyers outside of courtrooms, the number of experienced trial lawyers is rapidly decreasing. So, to supply a synthetic experience in capsule form to take the place of trial experience, we have rules of court, such as 28 U.S.C.A. Rule 43 (c), *supra*, just as we have vitamin pills as a substitute for meals which always have taken considerable time in preparation as well as in eating. So, now, without trial experience, or the expenditure of time to learn why it is so, the modern lawyer may simply read the rules of civil procedure and practice according to the rule book. If there is any area of trial court practice which is not now covered by the rules, it is probable that a new rule will be promulgated in due time.

We have attempted to reproduce the essence of the turbulence under which respondent was required to act in protecting his client's rights. It is not the purpose of this opinion to decide whether he was correct in his statement of the substantial rights of his client. We are here concerned with the question of whether respondent as an attorney conducted himself properly in an attempt to represent his client. It was his right as well as his duty to firmly and respectfully advance plaintiff's claims and assert its rights. In so doing, he had as much right to be in the courtroom and to act as did the judge. He had a right, when the court ruled that he could not introduce evidence, to make offers of proof thereof, to the end that, in case of an appeal, a proper basis for a review might appear in the record. The presiding judge had a right to punish respondent for any contumacious violation of

his duty as a member of the bar in this proceeding. Power to punish for contempt is one which must be used sparingly and only when it is clearly demonstrated that the respondent's conduct is contumacious and tends to bring the administration of justice into disrepute, rather than when his conduct is that of a determined level-headed practitioner who is acting respectfully to the court under considerable pressure in a lengthy and important trial.

18 U.S.C.A. § 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person, in its presence or so near thereto as to obstruct the administration of justice;
>
> * * *

In *Ex parte Hudgings*, 249 U.S. 378, 383, the court said:

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted—
>
> * * *"

This case was cited with approval in *In re Michael*, 326 U.S. 224, 228.

In the case at bar the order from which the appeal was taken contains no finding that respondent's conduct tended to obstruct or continued to obstruct the administration of justice, although we do not base our decision on this omission. Rather we think that its absence strongly indicated that the district court could find no support in the record for such a statement. Actually it appears that the specifications upon which the order was based were not made until several weeks after the trial in question had occurred.

As to specification 6, we hold that, with the exception of one statement attributed to respondent, nothing with which he is charged has been supported by proof of contumaciousness or disrespect.

The exception in specification 6, to which we have just referred, charges that respondent said:

> "* * * We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us."

The whole theory for holding respondent immune from his conduct in representing his client in good faith is satisfied when he is permitted to make a record in a respectful manner in the trial court for use in a court of review. The theory rests on the premise that he needs no further protection than an adequate record and that, if the court infringes his right to make such a record, his redress is in the court of review. His language which we now quote indicates that he did not rely alone upon this protection but that he took the position that he intended to physically defy the court to the point that only a superior physical force called upon by the court could prevent him from proceeding. Even if he was right in his method of making a record and the court was wrong, this threat was inexcusable contumacious conduct. While events did not precipitate a physical clash, respondent made it clear when he uttered these words that he proposed to insist upon pursuing his course of action until stopped by a court bailiff. This proof is enough to support specification 6 and to that extent will require an affirmance of the order from which this appeal has been taken. We shall, however, reduce the punishment thereunder to a fine of $100.

Specification 7 reads:

> "Repeatedly during the course of the trial Thomas C. McConnell conducted himself in a contumacious

> manner by employing a tone of voice and an attitude indicating contempt and defiance of the Court and disregarding admonitions of the Court with respect to his conduct before the jury."

This specification, without citation of any part of the record to support it, is too general to require an answer by respondent or a definitive ruling by this court. If the law were otherwise, we would be required to determine whether the order was justified without being directed to a single fact, word or deed alleged to have been spoken or performed by the accused. As one court said in regard to such a charge:

> "* * * The conclusions of the judge, unsupported by specific facts, in a direct contempt proceeding bear no weight whatsoever."

People v. *Hassakis*, 6 Ill. 2d 463, 129 N. E. 2d 9, 11: To the same effect are cases summarized in 154 A.L.R. 1227.

We find nothing cited in a brief filed by the United States attorney in support of the contempt orders which justifies specification 7. In fact, that brief seeks shelter in the argument that, inasmuch as concurrent sentences were imposed on each of several specifications, the upholding of an order on any one is sufficient.

We hold that specification 7 does not constitute contempt as a matter of law since it recites mere conclusions and no facts on which the alleged contempt is based.

2. Respondent contends that fundamental fairness required that Judge Miner disqualify himself from acting in the contempt matter. This, he says, is because Judge Miner considered the alleged contempts as a personal attack upon himself, and, at the same time, he conceded that there was "no emergency about it."

Respondent relies particularly upon *Offutt* v. *United*

States, 348 U.S. 11; *In re Marchison*, 349 U.S. 133; and *Farese* v. *United States*, 1 Cir., 209 F. 2d 312, 315.

It is a general rule that a direct contempt against the court is not sufficient to disqualify a court or a judge thereof. *Patterson* v. *Colorado*, 205 U.S. 454, 463.

In discussing rule 42 (a)[3] the court said in *Sacher* v. *United States*, 343 U.S. 1, 11:

> "A construction of the Rule is advocated which would deny a judge power summarily to punish a contempt that is personal to himself except, perhaps, at a moment when it is necessary to forestall abortion of the trial. His only recourse, it is said, is to become an accuser or complaining witness in a proceeding before another judge.
>
> "The Rule itself expresses no such limitation, and the contrary inference is almost inescapable. It is almost inevitable that any contempt of a court committed in the presence of the judge during a trial will be an offense against his dignity and authority. At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other. It cannot be that summary punishment is only for such minor contempts as leave the judge indifferent and may be evaded by adding hectoring, abusive and defiant conduct toward the judge as an individual. Such an interpretation would nullify, in practice, the power it purports to grant."

In *Offutt* v. *United States*, *supra*, the court considered a proceeding growing out of a criminal trial where Offutt was defendant's trial counsel. From the opinion of the Supreme Court the following statement of facts appears, at 12:

* * *

3. 18 U. S. C. A. rule 42(a).

"• • • Almost from the outset, a clash between the presiding judge and petitioner became manifest, which, it is fair to say, colored the course of the trial throughout its 14 days, and with increasing personal overtones. The judge again and again admonished petitioner for what he deemed disregard of rulings and other behavior outside the allowable limits of aggressive advocacy, and warned him of the consequences by way of punishment for contempt which such conduct invited. On the other hand, these interchanges between court and counsel were marked by expressions and revealed an attitude which hardly reflected the restraints of conventional judicial demeanor. Such characterization of necessity derives from an abiding impression left from a reading of the entire record.

"At the close of the trial, after the jury had retired for deliberation, the judge, acting under the procedure prescribed by Rule 42 (a) of the Federal Rules of Criminal Procedure and involving the authority of *Sacher* v. *United States*, 343 U. S. 1, found the petitioner guilty of criminal contempt on the basis of a certificate filed under the Rule, containing 12 findings of 'contumacious, and unethical conduct in open court during the trial,' and ordered him committed for 10 days to the custody of the United States Marshal for the District of Columbia.

"The Court of Appeals found that four of the 12 findings amply supported the commitment, but reduced the punishment from 10 days to 48 hours. It concluded that 'the record does not support the penalty imposed. Appellant's conduct cannot fairly be considered apart from that of the trial judge. Each responded to great provocation from the other. • • •'"

The court pointed out at 17:

"• • • The record discloses not a rare flare-up, not a show of evanescent irritation — a modicum of quick temper that must be allowed even judges. The record is persuasive that instead of representing the impersonal authority of law, 'the trial judge permitting himself to become personally embroiled with the petitioner. • • •'"

In reversing, the court suggested that the judge who imposed the sentence should invite the assignment of another judge to sit in the second hearing on the charge against the petitioner.

In the present appeal, while what we have said herein has not been in entire approval of the conduct of the district court, we do not find that he was personally involved in controversy with the respondent or that in his rulings leading to the orders appealed from he was actuated by personal enmity toward either of the lawyers held in contempt. Accordingly we do not feel that the *Offutt* case requires that upon the record before us there should be a remandment for retrial before another judge. Whatever may have been the reasons that caused the trial judge to commit the errors which we have recounted in cases Nos. 13160, 13175 and 13176, the records before us affirmatively rebut any personal enmity harbored by the judge against the two respondents before him.

We, therefore, hold that the district court did not err in failing to refer the questions of contempt to the executive committee for assignment for hearing by another judge.

3. In addition to the specifications aforesaid, the order now under attack contains some prefatory remarks which respondent characterizes as "a diatribe without any support in the record." He refers to this language:

> "* * * Both attorneys for the plaintiff herein, embarked upon a course of unprofessional, unethical, intimidating, insulting, defiant, unfair and improper behavior, to foist their will upon the Court and jury and to dominate the course of procedure herein without regard to an honest and impartial administration of justice."

Inasmuch as the court's order must stand or fall on the specifications, the language in the preface is unim-

portant, unless it supports respondent's contention that it showed the prejudice of the trial judge and that he was "incapable of giving him any kind of a fair hearing on the issue of contempt". We cannot give it such effect. Nor does the court's language in the preface indicate that the order of contempt or the punishment therefor was based upon the conduct described other than in the specifications. In this respect, we are impressed by the reasoning of the court in *MacInnis* v. *United States*, 9 Cir., 191 F. 2d 157, 161, cert. denied, 342 U. S. 953:

> "* * * The court's remarks addressed to counsel after the verdict had been returned admirably show the poise of the judge and that the sentence was based upon the statements contained in the certificate in their frame of circumstance. The court's reference to the general conduct of counsel throughout the trial does not indicate that either the judgment of contempt or the punishment therefor rests upon such conduct. The court found appellant's statements to be contemptuous and measured the punishment to fit the offense. The court's remarks constitute an explanation of the fact that counsel's conduct other than the contemptuous remarks was such that the contemptuous statements would not be condoned."

In accordance with the reasons which we have stated, the order from which this appeal has been taken is reversed as to respondent Thomas C. McConnell, except as to specification 6 therein only as to which it is affirmed and this cause is remanded to the district court with instructions to vacate the sentence imposed and in lieu thereof to impose a fine of $100 on said specification 6, to be paid by respondent Thomas C. McConnell to the clerk of the district court, pursuant to law.

ORDER REVERSED IN PART AND IN PART AFFIRMED AND REMANDED WITH INSTRUCTIONS.

DUFFY, *Circuit Judge*, dissenting in part.

I agree with the majority opinion that the convictions under Specifications 5 and 7 should be reversed. I also agree that Judge Miner did not err in failing to ask the Executive Committee to assign another judge to hear the charges of contempt.

I would also reverse as to Specification 6. The majority opinion describes the difficulties the plaintiff's counsel McConnell encountered in trying to preserve his client's rights. The attorneys for plaintiff were driven to a sense of frustration due to the District Court's rulings on offers of proof. Under such circumstances, it is understandable that an attorney might say things which should not have been said. I think that was the situation in the case at bar.

However, the majority opinion does not adequately present the setting in which the McConnell statement was made. He addressed the Court as follows: "We have a right to ask questions which we offer on this issue, and Your Honor can sustain their objection to them. We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us." McConnell's statement occurred during the reading of the deposition of Howard E. Simpson, president of the Baltimore & Ohio Railroad. Simpson was a defendant. One of plaintiff's attorneys was reading portions of Simpson's adverse examination to lay the foundation for an offer of proof. The statement made by McConnell was followed almost immediately by a recess. When the court session was resumed, Mr. McConnell complied with the Court's ruling, and did not persist in asking the particular questions.

It might be noted that counsel's vigorous insistence on preserving his client's rights bore fruit, as the trial judge later changed his ruling. Counsel was then permitted to

ask questions in the presence of the jury as a condition precedent to the offers of proof made in accordance with Rule 43(c), Federal Rules of Civil Procedure.

Mr. McConnell has had much trial experience. Even under the stress of the exasperating conditions such as he encountered, he should never have threatened to continue asking the questions in view of the Court's rulings, although he felt certain the rulings were incorrect. After the recess, when he had had time to cool down and consider the language used, he should have apologized to the Court.

Nevertheless, Mr. McConnell did comply with the Court's order. At that point there was no interference with the conduct of the trial. There was no obstruction in the administration of justice. In my view, the conviction for criminal contempt under Specification 6 should also be reversed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

No. 13176 SEPTEMBER TERM, 1960 APRIL SESSION, 1961.

PARMELEE TRANSPORTATION COMPANY, a Delaware corporation, *Plaintiff.*
v.
JOHN L. KEESHIN, ET AL., *Defendants.*

In the matter of criminal contempt of LEE A. FREEMAN, *Respondent-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 10, 1961

Before, DUFFY, SCHNACKENBERG and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Lee A. Freeman, respondent, has appealed from an order of the district court entered by Judge Julius H. Miner thereof, on June 30, 1960, adjudging him guilty of criminal contempt and sentencing him to confinement for a period of ten days on each of four specifications set forth in said contempt order, said sentences to run concurrently. The alleged acts of contempt occurred in connection with the trial of the case of *Parmelee* v. *Keeshin*,[1] in which respondent was co-counsel for plaintiff with Thomas C. McConnell.

1 An appeal in this case was decided in this court, as case No. 13160, on June 30, 1961.

1. Specification 1 reads as follows:

"On April 28, 1960, in the presence and hearing of the jury, the following occurred:

'By Mr. Freeman: Was the railroad service limited in substantial respects with respect to the railroad passengers that had available to them these transfer coupons?

'By Mr. Keating: Same objection, as a conclusion.

'By the Court: The same ruling.

'By Mr. Freeman: That is crazy.' "

During a jury trial required by the court on the sole issue of public injury, over the objection of counsel in the case, and in the presence of the jury, Benjamin F. Goldstein, a witness called by plaintiff, was testifying, under examination by respondent. The court sustained objections to certain questions put by respondent who remarked, "that is crazy."

We have carefully read the record of proceedings and believe that it can be reasonably inferred that the last remark of respondent was addressed to his co-counsel, Mr. McConnell, and was not intended to be heard by either the court or the jury. Certainly the record fails to show that Judge Miner took any notice whatever of the remark at the time. When the jury had been excused for the day, respondent's opposing counsel said:

"I would just like to say that I appreciate that it is difficult perhaps for counsel for the plaintiff, sitting within three or four feet of the jury, to confer at all without conveying it in such a fashion the jury will overhear it.

"I overhead one of the remarks this afternoon, clear over in my seat, which is twice as far away as the jury is."

Whereupon respondent answered:

"You don't have to say any more, Mr. Thompson. If I did do that, it was certainly inadvertence, and

we will, if there is any conferring, it will be in the lightest whisper. We certainly understand what you suggest is entirely proper."

Whereupon the court stated:

"I think that covers that with the jury and with counsel."

We hold that contumacious conduct has not been proved under specification 1.

2. Specification 2 reads as follows:

"On April 29, 1960, out of the presence and hearing of the jury but in open court, Mr. Freeman made the following statement to the Court:

'Your Honor, may I, with all deference, inquire whether or not this memorandum that was entered by you on December 6 has any significance or shall it be completely ignored?

'It seems to be, Your Honor, that you are willing to ignore those instances, and I will point out another one to Your Honor where you have ruled that documents are admissible, but at any time I seek to present a document that you have ruled admissible, there is a waving of arms on my learned counsels' side, and an immediate denial.

'I think, Your Honor, that if there is to be a reconsideration of this memorandum, it should be reconsidered for both sides and not for one side, and let me just in this connection point out that you have during the course of this trial rejected the Soo Line exhibits, which are exhibits, Plaintiff's Exhibits 11, 12 and 13.

'These three documents were submitted in our list of documents that we intended to offer as Item 43, and there was an objection made by the defendant railroads joined in by counsel for the other defendants, that these documents were internal documents, immaterial and hearsay, and on page 9 of this memorandum of opinion that you rendered on December 2, 1959, on page 5, rather, those objections are overruled.

> 'The Soo line memoranda are to be considered admissible there and Your Honor has changed his ruling again, and it occurs to me, and I say it again with all due deference, that no favorable ruling that we have gotten in the past from you will stick, but every unfavorable ruling will be reiterated, and I don't think that is a fair trial.' "

Repeatedly expressing deference, respondent made inquiry of the court about a ruling which he obviously intended to inform the court was confusing to him. We are inclined to think that respondent was sincere in his attitude because of the rather dubious language used by the court in the memorandum about which he inquired. This is the court's own language from the memorandum:

> "All documents the objections to which are here overruled are rendered not inadmissible only to the extent that the Court will permit plaintiff to tender them for admission into evidence at the time of trial. Documents here ruled inadmissible may not be so tendered at the trial. Whether any document, not by these rulings rendered inadmissible, will be admitted into evidence at the trial is a question reserved by the Court for ruling at the time of its tender by plaintiff at the trial.
>
> "Any document to which defendants' objections are here sustained may, upon approval by the Court, become admissible, notwithstanding, only for purposes of impeachment, and then only to prove the inaccuracy of specific facts testified to on direct examination, in which case the document herein ruled inadmissible may be admitted into evidence if it patently and explicitly, not as a matter of inference or implication, states the fact concerning which the direct testimony is being controverted."

In this court it is the contention of counsel for respondent that the meaning of this language is that rulings against the plaintiff were final, whereas rulings against the defendant were tentative only, and that the defendants,

and they alone, were to have the privilege of a second ruling. Whether this be correct or not, we believe that a situation existed which created a doubt in respondent's mind and that he was in good faith attempting, with *due deference*, to clear up that doubt by a reasonable inquiry and that his conduct in that regard was respectful and did not constitute contempt of court.

3. Specification 3 reads as follows:

> "Repeatedly during the course of the trial Lee A. Freeman conducted himself in a contumacious manner by employing a tone of voice and an attitude indicating contempt and defiance of the Court, by sneering and laughing on occasions when the Court ruled against him and by disregarding admonitions of the Court with respect to his conduct before the jury."

It contains no citation of any part of the record to support it and it is too general to require an answer by respondent or a definitive ruling by this court, as we held in reference to specification 7 in No. 13175, *In the matter of criminal contempt of Thomas C. McConnell*, July 6, 1961.

4. Specification 4 reads as follows:

> "On January 26, 1960, in the presence of the Court before the jury was impaneled during the course of a hearing on its memorandum dated December 4, 1959, which constituted the Court's rulings on the admissibility of numerous documents which had been tendered by the plaintiff for use in the trial and objected to by the defendants, Mr. Freeman, among other things, referred to several of the Court's December 4th rulings as demonstrating 'a sardonic sense of humor', * * * thereby charging the Court with bitter, heartless, scornful, insincere and disdainful conduct. The Court referred specifically to the above quoted statement of counsel (at page 9 of the memorandum), as well as to other

> abusive remarks of counsel, and ruled that there was no merit to counsel's objections to and arguments upon the Court's pre-trial memorandum, dated December 4, 1959 aforesaid."

It will be noted that the events involved in this specification occurred more than three months before the trial in *Parmelee* v. *Keeshin* began. The phrase "a sardonic sense of humor" appeared, when spoken by respondent, in the following context:

> "* * * You exclude the Forgash documents, and I have already discussed that, but here I must call your attention to 14 and 16 where you have excluded all of the documents except Forgash Exhibit 1, and Ryan Exhibit No. 1.
>
> "This, I construe as a sardonic sense of humor, because those two documents are the subpoenas that we served on Forgash, the subpoena that we served on Ryan to produce these documents that you now say are inadmissible, and you tell us that we can, before the jury, present to the jury the subpoenas that we served on them and nothing else.
>
> "I think it was the result of a misapprehension, your Honor. I think it was the result of a misconception of what was involved here. I think you have been imposed upon, as I say."

Read in context, we have difficulty in attributing to the phrase "a sardonic sense of humor" misconduct which obstructed the court in the performance of its judicial duty.[2] The presence of that element must clearly be shown in every such case where the power to punish for contempt is exerted. *Ex parte Hudgings*, 249 U. S. 378, 383. Moreover, in determining whether there has been any obstruction of the court's performance of its

2. Vol. VIII, The Oxford Dictionary, 110, points out the path which "sardonic" has traveled in English literature. For instance, in 1675, Hobbes *Odyssey xx*, 276 recorded: "Then Smil'd Ulysses a Sardanique smile."

judicial duties, the reasonably to be expected reactions of those in the courtroom to the words or acts under scrutiny are relevant. If there was such obstruction resulting from what respondent said, that should be ascertained from the record of what occurred at the time. Citation for direct contempt should not be delayed for months. It should spring fresh from the alleged obstruction of the court's performance of its judicial duty, although adjudication and punishment might well await the convenience of the court's business. The record suggests that the words used by respondent were not considered by the judge as derogatory when spoken. At that time he took no exception, made no protest, admonition or request for apology, and gave no notice of the remark. Instead the judge proceeded with a discussion about the documents under consideration.

The court on March 10, 1960, more than two months after the words were spoken, referred *inter alia* to the statement that it had "a sardonic sense of humor" and disposed of that and other matters by saying merely that "The court is unable to find any basis for these charges."

The court waited more than five months after the alleged contempt had been committed, and only then specified the contempt charges and entered the order from which this appeal has been taken. The very fact that in the meantime various proceedings, including a long-drawn-out trial, had occurred, is rather conclusive evidence that these words of respondent in no way obstructed the court in the performance of its judicial duty, an element that must be clearly shown in every case where the power to punish for criminal contempt is exercised. The language of specification 4 suggests that, when the processes of the court in this litigation had at a later date ground to a conclusion, the judge

adopted a dictionary definition of the word "sardonic" and embodied it in specification 4. We must however bear in mind that the test of contumaciousness of words spoken during a court proceeding is their effect as contemporaneously understood by those who heard the words spoken in the courtroom. This includes the judge as well as other persons present. If no one in the courtroom either knows the meaning of the words spoken or then consults a dictionary as to their meaning, we doubt whether justice has suffered and that a contempt has occurred. However that may be, the meaning of a spoken word used in a courtroom during a judicial proceeding cannot months later be learned and used retroactively to punish the speaker when only he (if anyone) knew the meaning of the word when he used it.

On the record before us, we hold the respondent was not proved guilty under specification 4.

In accordance with the reasons which we have stated, the order from which this appeal has been taken is reversed.

ORDER REVERSED.

UNITED STATES COURT OF APPEALS
for the Seventh Circuit.
Chicago 10, Illinois

Thursday, July 6, 1961.

Before

Hon. F. Ryan Duffy, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Latham Castle, Circuit Judge.

PARMELEE TRANSPORTATION COMPANY, a Delaware corporation,
Plaintiff,
vs.
JOHN L. KEESHIN, ET AL.,
Defendants.

No. 13175
In the Matter of Criminal Contempt of THOMAS C. McCONNELL,
Repondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court in this cause appealed from be, and the same is hereby, Reversed as to respondent Thomas C. McConnell, except as to specification 6 therein only as to which it is Affirmed, and that this cause be and it is hereby, Remanded to the said District Court with instructions to vacate the sentence imposed and in lieu thereof to impose a fine of One Hundred Dollars ($100.00) on said specification 6, to be paid by respondent Thomas C. McConnell to the Clerk of the District Court, pursuant to law, in accordance with the opinion of this Court filed this day.